

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In re:	)	
	)	
Transaction Network Services, Inc.,	)	CC Docket No. 95-155
TSYS Acquiring Solutions, LLC, and	)	
Electronic Payment Systems, LLC	)	
	)	
Regarding FCC Jurisdiction and	)	
RespOrg Responsibilities to Comply	)	
with Part 52 of the FCC's Rules and	)	
the SMS/800 Tariff Requirements	)	
To: The Commission		

**OPPOSITION TO  
APPLICATION FOR REVIEW**

**TSYS ACQUIRING SOLUTIONS, LLC**

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**OPPOSITION TO  
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**Summary**

TSYS Acquiring Solutions, LLC ("TSYS"), by its counsel, hereby submits its Opposition to the Application for Review filed by Electronic Payment Systems, LLC ("EPS") in the above-captioned proceeding. The Application for Review urges the Commission to not merely overrule the Wireline Competition's Bureau's Declaratory Ruling in this proceeding, but to necessarily change the Commission's existing rules and policies to accomplish that result. EPS's Application for Review is both substantively and procedurally defective, and as is demonstrated below, seeks to perpetrate a fraud upon the Commission in asserting that no toll free number hoarding or brokering is involved here. As was the case with EPS's Opposition below, its Application for Review lacks any basis in fact or law, and instead merely urges the Commission to ignore existing rules and policies in order to achieve a result more to EPS's liking. For these and numerous other reasons discussed herein, EPS's Application for Review should be denied.

## Background

As discussed in detail in TSYS's original Petition in this proceeding,<sup>1</sup> which is hereby incorporated by reference, TSYS is one of the largest processors of payment card transactions in the U.S., processing the front end (authorization) and back end (settlement) of payment card transactions. Many merchants, particularly small businesses, use point of service payment card readers that rely on dial-up connections to relay payment card and transaction data to TSYS so that payment card transactions can be processed and the merchant paid. To accommodate this need, TSYS has a pool of toll free numbers for which it is the subscriber of record that are used to provide dial-up payment card processing. Each local point of service payment card reader has a primary toll free number and typically a secondary or backup toll free number embedded in its software. When a merchant runs a customer's payment card through the reader, the device calls TSYS (via its RespOrg) on its set toll free number and relays the payment card and transaction information to TSYS so that the merchant can obtain authorization for the transaction. Transaction Network Services, Inc. ("TNS") and Verizon are the RespOrgs for the TSYS toll free numbers that are the subject of the Declaratory Ruling from the Wireline Competition Bureau (the "Bureau").

The toll free numbers maintained by TSYS and made available for use by merchants are therefore the "pipes" through which payment card and transactional data flows. **The seven TSYS toll free numbers at issue in this proceeding are used by over 750,000 payment card readers throughout the U.S., processing over One Billion payment card transactions per**

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<sup>1</sup> Petition of TSYS Acquisition Solutions, LLC, *In re Transaction Network Services, Inc., TSYS Acquiring Solutions, LLC, and Electronic Payment Systems, LLC Regarding FCC Jurisdiction and RespOrg Responsibilities to Comply with Part 52 of the FCC's Rules and the SMS/800 Tariff Requirements*, CC Docket No. 95-155 (filed January 24, 2011) (the "Petition").

year.<sup>2</sup> This represents nearly **12%** of the businesses in the U.S.<sup>3</sup> On a typical day, TSYS processes over \$150 million dollars in payment card transactions through its toll free numbers.<sup>4</sup> It is critical to these businesses, which are in turn critical to the U.S. economy, that these payment card transactions go through promptly, reliably, and successfully.

In 2005, EPS entered into a Processing Services Agreement with TSYS under which TSYS would provide credit card processing and authorization services to merchants represented by EPS.<sup>5</sup> TSYS then began the process of working with EPS to convert EPS's merchants to the TSYS card processing system. As part of that process, *EPS* selected the toll free numbers (from the pool of numbers held by TSYS) that were programmed into its merchants' point of service payment card readers.<sup>6</sup> EPS placed most of its merchants on three of the TSYS toll free numbers, but scattered some of its merchants across several other TSYS toll free numbers.<sup>7</sup> EPS has continued to do this with new merchants it has signed up since that time.

TSYS has remained the primary processor for EPS since 2005, but EPS merchants represent only a tiny portion of the businesses that use TSYS's dial-up processing. For example, in November of 2010, on the three TSYS numbers for which TNS is the RespOrg, 2,450 EPS merchants processed approximately 164,079 transactions, whereas approximately 573,000 *non*-EPS merchants processed 70.2 *million* transactions on those three toll free numbers.<sup>8</sup>

After repeated fee disputes between TSYS and EPS, the parties entered into binding arbitration proceedings in 2008 to resolve the fee issues. In early 2009, the arbitrator found in

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<sup>2</sup> Petition at 3.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 3-4.

<sup>8</sup> *Id.* at 4.

favor of EPS, and ordered TSYS to pay approximately \$3 million to EPS.<sup>9</sup> TSYS subsequently paid EPS that amount in satisfaction of the arbitrator's award.

In addition to the financial award, however, EPS asserted during the arbitration that TSYS had verbally promised to provide EPS with an exclusive toll free number for its merchants' payment card processing. TSYS disputed that claim, noting among other things that the parties' Processing Services Agreement included an "integration clause" stating that "This Agreement constitutes the entire agreement between the parties hereto relating to the subject matter hereof and all prior negotiations, agreements, and understandings, whether oral or written, are superseded hereby." Despite this express contractual language, the arbitrator ruled that there had been a verbal agreement that TSYS would provide "*the* toll free number" used by EPS, and the arbitration award included the following language:

5. The Arbitrator orders TSYS to provide EPS with immediate and continuous ownership, control and access to the toll free 1-800 number that connects EPS' merchants to a processor.<sup>10</sup>

Since this arbitration ruling was released, it has become clear that the arbitrator was unaware that EPS had been programming a variety of TSYS's toll free numbers into its merchants' point of sale payment card devices, none of which were exclusive to EPS merchants, and that as a result, "*the* toll free 1-800 number that connects EPS' merchants to a processor" does not exist. In fact, EPS is using seven of TSYS's toll free numbers (the numbers addressed by the Declaratory Ruling) to provide EPS merchants with payment card processing services.<sup>11</sup> All of these numbers were in use by TSYS prior to the 2005 Processing Services Agreement

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<sup>9</sup> *Id.* at 4.

<sup>10</sup> See *TSYS Acquiring Solutions, LLC v. Electronic Payment Systems, LLC*, Order, Doc. 59 in Case No. 2:09-CV-00155-JAT (D. Ariz. 2010), at 7 (lines 22-24).

<sup>11</sup> Petition at 5. The seven toll free numbers are: 800-370-8507, 877-488-0358, and 800-411-6902 (the three for which TNS is the RespOrg), and 800-523-0527, 800-533-4488, 877-488-0467, and 877-488-0757 (for which Verizon is the RespOrg).

between TSYS and EPS. As a result, none of these numbers are exclusive to EPS merchants who, as discussed above, represent only a tiny portion of the transactions transmitted over any of these numbers.

Given these facts, TSYS concluded that the most reasonable interpretation of the language from the arbitration award was that TSYS was required to obtain such a number for EPS's exclusive use. In October of 2009, TSYS offered to satisfy the arbitrator's award by procuring for EPS a dedicated toll free number for use exclusively by EPS merchants. EPS rejected that offer the very next day, asserting that it wanted the existing number (that actually did not exist) referenced in the arbitration order.<sup>12</sup>

As EPS sought to enforce the toll free number aspect of the arbitration award in court, TSYS sought to have the binding arbitration award vacated. Unfortunately, the Federal Arbitration Act intentionally makes it extremely difficult to overturn a binding arbitration decision, and TSYS's efforts to do so were rebuffed. TSYS subsequently sought to have a federal district court in Arizona clarify that, since the toll free number referenced in the arbitration award does not actually exist, the award should be interpreted to require the creation of a new exclusive toll free number for EPS merchants' payment card transactions.<sup>13</sup> However, that request for clarification was also denied, and TSYS has appealed that decision to the U.S. Court of Appeals for the 9<sup>th</sup> Circuit, where the appeal is currently pending.<sup>14</sup>

As it became clear in the course of these various court proceedings that there was no existing toll free number dedicated exclusively to EPS merchants, and that EPS merchants were using seven different TSYS numbers shared with hundreds of thousands of non-EPS merchants,

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<sup>12</sup> Petition at 5.

<sup>13</sup> *Id.* at 5-6.

<sup>14</sup> *Id.* at 6.

EPS altered its approach and argued that the only way to satisfy the arbitration award is to require TSYS to transfer all seven toll free numbers to EPS. The federal district court agreed that is what EPS was seeking, stating:

[TSYS] asserts that the newly discovered evidence – namely, the disagreement between the parties concerning the meaning of the award of the 1-800 number – did not come to light until October 2009. The Court disagrees. The arbitrator issued his award in January 2009. It is clear from the face of the award what the arbitrator ordered: that [TSYS] turn over control of the numbers that connect [EPS’s] customers to a processor. [TSYS] focuses on the word *the*, but misses the thrust of the arbitrator’s finding and conclusion; namely, that [EPS] is to be awarded control over its merchants in the event [EPS] decides not to retain [TSYS’s] services. It was not the goal of the arbitrator, as mentioned throughout his award, to award [EPS] a single telephone number; rather, [EPS] was seeking ownership and control of the numbers its merchants use.<sup>15</sup>

EPS proceeded in earnest to enlist the federal courts in its efforts to forcibly take all seven toll free numbers from TSYS, filing a Motion to Compel surrender of “ownership, control and access” to the numbers in the Arizona federal district court, and serving a Writ of Execution on TNS, one of TSYS’s two RespOrgs for the toll free numbers, through the U.S. District Court for the Eastern District of Virginia.<sup>16</sup> The Writ, which EPS recently withdrew without prejudice in light of the Bureau’s Declaratory Ruling, demanded TNS hand over

the goods and chattels, lands and tenements in your district belonging to:  
TSYS Acquiring Solutions, LLC and held by Transaction Networks  
Services, Inc. and set forth in Schedule A attached hereto.<sup>17</sup>

Schedule A of the Writ listed the “Specific Property” to be turned over as “Toll-free numbers 800-370-8507, 877-488-0358 and 800-411-6902 and all documents necessary to provide

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<sup>15</sup> *TSYS Acquiring Solutions, LLC v. Electronic Payment Systems, LLC*, 2010 WL 1781015 (D. Ariz. 2010), at \*5 (brackets in original; emphasis in original).

<sup>16</sup> Petition at 6-7.

<sup>17</sup> See Petition at Exhibit 1.



Electronic Payment Systems, LLC with immediate and continuous ownership, control, and access to said numbers.”<sup>18</sup>

In response to these actions, TSYS filed its Petition with the FCC asking the FCC to exercise its primary jurisdiction over toll free numbers and enforce its rules and policies prohibiting transfers of such numbers between unaffiliated entities. While the Petition was pending at the FCC, the court in Arizona granted EPS’s Motion to Compel, requiring TSYS to transfer the seven toll free numbers to EPS within 90 days.<sup>19</sup> When the Bureau issued the Declaratory Ruling, TSYS asked the Arizona court to reconsider its grant of the Motion to Compel, and that court has temporarily stayed enforcement of its order while it considers TSYS’s Motion for Reconsideration.<sup>20</sup> EPS has filed a response to that reconsideration suggesting various ways it believes the court could evade the Declaratory Ruling and the FCC’s authority over toll free numbers.<sup>21</sup> To say the least, none are compatible with the Commission’s “first come, first served” rules and policies regarding toll free numbers, nor with the Declaratory Ruling.

It is in this context that EPS has filed its Application for Review, effectively telling the Commission to rewrite its rules and policies regarding toll free numbers to permit the transfer, while telling the court in Arizona that neither the FCC nor the Declaratory Ruling are an obstacle to transferring control of the numbers to EPS. As discussed below, what EPS seeks from the Commission lacks any basis in fact or law, and would harm not just TSYS, but hundreds of

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<sup>18</sup> Petition at Exhibit 1.

<sup>19</sup> See *TSYS Acquiring Solutions, LLC v. Electronic Payment Systems, LLC*, 2011 U.S. Dist. LEXIS 11647 (D. Ariz. Jan. 28, 2011); *TSYS Acquiring Solutions, LLC v. Electronic Payment Systems, LLC*, Order, Doc. 108 in No. 2:09-cv-00155-JAT (D. Ariz. Feb. 15, 2011).

<sup>20</sup> *TSYS Acquiring Solutions, LLC v. Electronic Payment Systems, LLC*, Order, Doc. 113 in No. 2:09-cv-00155-JAT (D. Ariz. Mar. 4, 2011).

<sup>21</sup> EPS’s Response to the TSYS Motion for Reconsideration is attached hereto as Exhibit A.

thousands of local merchants and their customers, without any form of countervailing public benefit to justify such an action.

**I. The Transfer of Toll Free Numbers Sought by EPS Has No Legitimate Purpose**

To better understand EPS's multi-year pursuit of TSYS's toll free numbers, it is important to note that the transfer of the numbers to EPS serves no purpose whatsoever. The reason for the arbitrator ordering the transfer was ostensibly to ensure that EPS could easily change credit card processors when it desired by "repointing" its merchants' exclusive toll free number to a different processor, thereby avoiding the need to download a different toll free number into their card readers.<sup>22</sup> However, the arbitrator obviously did not understand the technology, because merely redirecting the toll free calls to a different processor would accomplish nothing for EPS or its merchants.

The payment card readers used by EPS (and other) merchants transmit the relevant transaction data via toll free numbers programmed into those units. TSYS, like other payment card processors, uses its own secure proprietary data format that is also programmed into the payment card readers to transmit the transaction data to TSYS. When a customer swipes their payment card in the merchant's card reader, the data for the transaction is sent over the toll free numbers to TSYS in "TSYS-speak" for processing and authorization of the payment. Redirecting that "call" to a different processor would accomplish nothing, since no other processor can "read" or process that highly confidential information in the TSYS format.

As a result, if EPS wishes to use a different payment card processor for its merchants, it will first need to download that new processor's software into its merchant's card readers. Because of this, EPS merchants would have to perform a download for their card readers

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<sup>22</sup> See, e.g., Application for Review at 3.

regardless, and including a new toll free number in that download is a simple matter. Indeed, it is standard operating procedure, since the change to a new processor invariably involves converting not just to that processor's software, but to its toll free numbers as well. Transferring control of TSYS's numbers to EPS would therefore serve no purpose, other than to bury its new card processor in "wrong numbers" from non-EPS TSYS merchants, whose card readers would continue to dial those numbers for each and every payment card transaction, leading to millions of failed transactions at businesses across America.

EPS's claimed reason for needing the seven toll free numbers transferred to it is therefore entirely fictional. Indeed, all merchants, including EPS merchants, that are currently using these toll free numbers would suffer substantial disruption in their ability to process customer transactions if they were removed from TSYS's control. As demonstrated below, EPS's sole purpose in doggedly pursuing control of TSYS's numbers is to profit by violating the FCC's prohibitions on toll free number hoarding and brokering with regard to those numbers.

## **II. The Application for Review Fails to Present Any Legal Basis Whatsoever for Challenging the Declaratory Ruling**

EPS's Application for Review seeks to paint EPS as a wronged party worthy of a unique exception to the Commission's prohibition on toll free number transfers. However, as the Declaratory Ruling made clear, the FCC has only twice authorized the transfer of a toll free number between unaffiliated parties, and has only done so "in extraordinary circumstances involving public safety."<sup>23</sup> Despite this clear statement, and the Declaratory Ruling's equally clear statement that "this declaratory ruling only reiterates our rules regarding the distribution

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<sup>23</sup> Declaratory Ruling at n.22.

and transfer of numbers,”<sup>24</sup> EPS challenges the result, and rests the entirety of its appeal on two “Questions presented”, which are stated as:

1. Where two or more unaffiliated commercial entities enter into a voluntary agreement to transfer the subscriber’s interest in toll free numbers in order to facilitate the continuation of business without interruption, (and there is no sale, hoarding, or brokering), can such transfer be accomplished through execution of a transfer of service agreement which indicates all parties, including the FCC, have been notified of the change?

If the answer to Question 1 is “no”, then:

2. Where two or more unaffiliated commercial entities enter into a voluntary agreement to transfer the subscriber’s interest in toll free numbers in order to facilitate the continuation of business without interruption, (and there is no sale, hoarding, or brokering), should the FCC approve such transfer even in the absence of ‘extraordinary circumstances involving public safety’?

Application for Review at 2.

The legal answer to both questions is of course “No”, as a contrary result would violate the Commission’s “first come, first served” rules and policies regarding toll free numbers, the SMS/800 Tariff, and the principles stated in all prior precedent regarding the transfer of toll free numbers.<sup>25</sup>

Importantly, EPS fails to actually dispute any component of the Declaratory Ruling. It does not challenge (at least with any coherent legal argument) that the FCC possesses exclusive jurisdiction over the assignment of toll free numbers, that the transfer would violate the explicit terms of the SMS/800 Tariff, that the Commission’s rules require that toll free numbers be assigned on a first come, first served basis, that because of this the FCC has never authorized the transfer of a toll free number between unaffiliated parties where lives were not in danger, or that RespOrg’s are prohibited as a matter of course from transferring numbers in violation of the

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<sup>24</sup> Declaratory Ruling at ¶ 9.

<sup>25</sup> See Petition at 11-23; Declaratory Ruling at ¶¶ 9-10.

Commission's rules and policies. Instead, EPS merely challenges the cumulative result of those individual facts, which is the Declaratory Ruling's conclusion that the toll free number transfer EPS seeks is not possible. In other words, the principal argument made by the Application for Review is just that EPS does not like the Bureau's result.

In this regard, it is also worth noting that EPS fails in its Application for Review to present a single FCC decision, rule, or policy that conflicts with the Declaratory Ruling. As discussed further below, the Application for Review does not seek an accurate interpretation of existing law, but the adoption of different laws more to EPS's liking. Thus, the "Questions presented" are questions only in the mind of EPS, and there is no legal basis for its Application for Review.

### **III. The Application for Review Seeks to Perpetrate a Fraud Upon the Commission**

In the absence of legal support for its desired outcome, EPS turns to factual misrepresentations to accomplish its objective. The Application for Review is rife with false statements and omissions. For example, its portrayal of how the Declaratory Ruling came into being is: "Proceeding unilaterally and without notice to EPS, TSYS sought a declaratory ruling from the Wireline Competition Bureau of the FCC. On February 24, 2011, the Bureau issued the requested ruling."<sup>26</sup> However, as the Certificate of Service to TSYS's Petition demonstrates, EPS was served with the Petition, and therefore certainly had notice of it. Also, absent from this narrative is the fact that EPS not only had an opportunity to respond, but actually did so, filing an opposition to TSYS's Petition. The Declaratory Ruling rejected the arguments that EPS now raises again in its Application for Review.<sup>27</sup>

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<sup>26</sup> Application for Review at 4.

<sup>27</sup> Declaratory Ruling at ¶ 5.

Of greater consequence, however, is the fact that the factual premise of *every single component* of both of EPS’s “Questions presented” is false. First, as the record indicates, there has never been “a voluntary agreement to transfer the subscriber’s interest in toll free numbers” here. The arbitrator’s ruling was merely that a verbal agreement to create a dedicated EPS number was made between the parties in 2005, and he ordered *as a remedy* that this dedicated number be transferred to EPS. When the arbitrator ordered that “*the* number” be transferred, he was unaware that no such dedicated number ever existed, much less that EPS had elected to place its merchants on *seven* of TSYS’s toll free numbers. Not even EPS can claim with a straight face that TSYS and EPS entered into a “voluntary agreement” to transfer seven toll free numbers in contravention of FCC rules and policies.

Second, as discussed above, the transfer of the toll free numbers has nothing to do with “facilitat[ing] the continuation of business without interruption.” To the contrary, a transfer would cause massive disruption to over 750,000 payment card readers used by merchants across the U.S., *including EPS’s own merchants*. Again, the premise of both questions presented is false.

Third, and this is where EPS moves from a callous disregard of the truth to an outright fraud upon the Commission, the premise of both “Questions presented” is explicitly conditioned upon there being “no sale, hoarding, or brokering” of the numbers. Elsewhere in its Application for Review, EPS reiterates in seeking its requested relief that “[t]here are no numbers that are being hoarded and not used,” and “[l]ikewise, EPS is not brokering or selling the numbers to another for consideration.”<sup>28</sup>

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<sup>28</sup> Application for Review at n.4.

Those statements are plainly false. Attached hereto as Exhibit B is a June 22, 2010 letter from EPS's counsel to TSYS's Arizona counsel noting how harmful the toll free number transfer would be for TSYS's business and merchants, and proposing that **"EPS will sell its number to TSYS for \$23,976,750."**<sup>29</sup> The letter concludes with the dark admonition that "[a]s you have already seen, as time passes **the price for which EPS is willing to sell its number to TSYS increases.** This trend will continue."<sup>30</sup>

EPS apparently felt its scheme to engage in toll free number hoarding and brokering would never become public, as it marked the front page of its letter "CONFIDENTIAL SETTLEMENT DOCUMENT PURSUANT TO F.R.E. 408." Rule 408 of the Federal Rules of Evidence generally prohibits the disclosure in court of a document relating to a settlement proposal. However, as the FCC's own Media Bureau noted in a decision just a few weeks ago, "[o]nly 'formal hearings' before the Commission, such as occur before an Administrative Law Judge, are governed by the Federal Rules of Evidence, and even then only if the ends of justice would be served by their application."<sup>31</sup> This proceeding is of course not a formal hearing, and the Commission is free to consider this documentation demonstrating that the transfer of toll free numbers sought by EPS is nothing more than an effort to engage in hoarding and brokering of toll free numbers. Indeed, "the ends of justice" require that consideration.

Thus, the "Questions presented" in EPS's Application for Review are not the actual questions here at all. The actual question EPS's Application for Review poses to the Commission is whether the Commission will overrule the Bureau's Declaratory Ruling by ignoring its own rules and every relevant Commission policy and precedent in order to clear the

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<sup>29</sup> Exhibit B at 2.

<sup>30</sup> Exhibit B at 3.

<sup>31</sup> *Comcast Cable Communications, LLC*, DA 11-466 (MB Mar. 10, 2011).

way for EPS to engage in a profitable violation of the FCC's prohibitions on toll free number hoarding and brokering. The answer to that question must obviously be a resounding "No".

#### **IV. EPS's Scheme to Engage in Hoarding and Brokering of Toll Free Numbers Is a Clear Violation of the Commission's Rules That Cannot Be Countenanced**

Section 52.107 of the Commission's Rules prohibits the hoarding or brokering of toll free numbers, as does the SMS/800 Tariff.<sup>32</sup> As Section 52.107(b) explains, the FCC "has concluded that hoarding, defined as the acquisition of more toll free numbers than one intends to use for the provision of toll free service, as well as the sale of a toll free number by a private entity for a fee, is contrary to the public interest in the conservation of the scarce toll free number resource and contrary to the FCC's responsibility to promote the orderly use and allocation of toll free numbers."<sup>33</sup>

As both the circumstances<sup>34</sup> and EPS's own letter<sup>35</sup> make clear, EPS seeks via this proceeding to first hoard the seven toll free numbers, and then broker them back to TSYS for a tidy sum. These are precisely the activities that the Commission sought to prevent in adopting Sections 52.107 and 52.111 (the first come, first served rule). Far from providing a basis for the

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<sup>32</sup> 47 C.F.R. § 107; SMS/800 Tariff at § 2.3.1(A)(8) ("All entities, (e.g., Resp Orgs, subscribers, service providers), are prohibited from selling, brokering, bartering, and releasing for a fee (or otherwise) any toll-free number.").

<sup>33</sup> 47 C.F.R. § 107(b). Section 52.107(a)(3) of the Commission's Rules notes that "[r]outing multiple toll free numbers to a single toll free subscriber will create a rebuttable presumption that the toll free subscriber is hoarding or brokering toll free numbers." 47 C.F.R. § 107(a)(3). Here, EPS seeks the transfer of seven toll free numbers that currently process the payment card transactions of hundreds of thousands of merchants for the claimed purpose of serving a vastly smaller number of EPS merchants. EPS argues that as long as a few EPS merchants are using each of the seven numbers, no hoarding is occurring. Application for Review at n.4. However, the test for hoarding is not merely whether a number is being used. As the Commission noted in adopting its prohibition on hoarding, one factor to be considered in identifying hoarding is "the amount of calling of a particular number ...." *Toll Free Service Access Codes*, 12 FCC Rcd 11162 (1997) at ¶ 40. Thus, even if the Commission did not have the "smoking gun" evidence it possesses here of hoarding/brokering, Section 52.107(a)(3) establishes a presumption of hoarding/brokering, and EPS has certainly failed to rebut that presumption.

<sup>34</sup> See Section I, *supra*.

<sup>35</sup> See Exhibit B.



Commission to make a unique exception to its rules and policies, the facts here present the very reason why having those rules in place is necessary to protect the public interest.

**V. EPS Presents No Public Interest Basis for Permitting the Transfer It Seeks**

Even were it not so transparently obvious that EPS opposes the Declaratory Ruling not because of any error in it, but because it stands in the ways of EPS's profit potential, the Commission would still need to examine the public interest basis for granting the relief EPS seeks. However, EPS points to no public benefit, and there is none. A transfer benefits only EPS. In contrast, approving the transfer would undercut the very public interest benefits the FCC sought to protect in adopting its first come, first served rule for the assignment of toll free numbers.

Moreover, approving the transfer would cause harm to hundreds of thousands of merchants in the U.S. that rely on those numbers for payment card processing, as well as a far larger number of members of the public that depend upon payment card transactions to purchase necessities, luxuries, and everything in between from those merchants. In short, EPS can point to no public benefit from approving the transfer it seeks, but the harm to the public of such a transfer is all too apparent.

**VI. The Relief Sought by EPS Is Not Even Theoretically Available Here**

**A. The Relief EPS Requests Exceeds the Scope of This Adjudicatory Proceeding**

As the Declaratory Ruling itself states, "this declaratory ruling only reiterates our rules regarding the distribution and transfer of numbers."<sup>36</sup> That being the case, EPS's effort to alter the result here through the filing of an Application for Review is a futile effort. "An adjudicatory proceeding involving a specific application is not the proper forum for requesting changes in

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<sup>36</sup> Declaratory Ruling at ¶ 9.

Commission procedures and processing guidelines, or for seeking changes in well-established ... priorities.”<sup>37</sup>

Yet that is precisely what EPS seeks to do here. First and foremost, of course, it asks the Commission to change the rules that stand in the way of its proposed transfer. However, it does not stop there. It proceeds to urge the Commission to “recognize that in cases of merger, acquisition, or Court Order..., prior FCC approval is not required, so long as no FCC regulation such as those prohibiting hoarding, brokering, or sale of numbers is implicated.”<sup>38</sup> First, since there is no merger or acquisition present here, EPS’s request is obviously beyond the scope of this adjudicatory proceeding. The Commission has repeatedly stated that where a party urges the Commission to ignore the language of its rules in order to reach the result sought by that party, the appropriate forum is not an adjudicatory proceeding, but a rulemaking proceeding.<sup>39</sup> The Declaratory Ruling did not make the rules; it only stated what they are, and a review of that ruling by the Commission is similarly limited.

Second, even were that not the case, EPS has failed to present *any basis* for the one rule change it requests that bears any relevance to this proceeding—creating a special exception for transfers related to court orders. Throughout its Application for Review, EPS bemoans the impact it alleges the Declaratory Ruling will have on those engaged in mergers and acquisitions, but that is of course irrelevant to an adjudicatory proceeding that involves neither. With regard to transfers relating to a court order, EPS fails to provide any reason for the Commission to modify its rules to create such an exception.

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<sup>37</sup> *Deer Creek Broadcasting, LLC*, 23 FCC Rcd 9553 (MB 2008), at ¶ 7.

<sup>38</sup> Application for Review at 10.

<sup>39</sup> *See, e.g., Comcast Cable Communications, LLC*, DA 10-1787 (MB Sept. 21, 2010), at ¶ 8 (“The County’s objection to the scope of our definition is more suited to a rulemaking proceeding where a rule can be modified than an adjudicatory proceeding where it is merely applied to a given set of facts.”).

Moreover, the reason the Commission has never created such an exception is all too apparent. Since an agreement to transfer toll free numbers violates the Commission's rules and the SMS/800 Tariff, it would make little sense to let parties circumvent the FCC by entering into such an agreement, having one of the parties intentionally "default", and then having the other party obtain a court order to enforce the contract. The Commission's rules would quickly become meaningless if all a party needed to do before ignoring them is maneuver themselves into a court order to engage in the prohibited activity.

**B. The Only "Authority" EPS Presents in Support of Its Requested Relief Is Erroneous and Irrelevant**

As noted above, EPS presents not a single FCC rule, policy, or precedent in support of its Application for Review. Instead, it presents three wholly irrelevant assertions. First, it presents as its major argument that the FCC is somehow bound by a Texas federal district court decision on a motion regarding the transfer of toll free numbers in *Ford Motor Co. v. United States Auto Club*, 2008 LEXIS 74198 (2008) ("*Ford Motor*").<sup>40</sup> The court in that matter refused a party's request to apply the primary jurisdiction doctrine and refer to the FCC the question of whether toll free numbers can be transferred. Claiming to use its own expertise to interpret the FCC's rules, the court denied a motion to dismiss an action seeking the transfer of such numbers, ruling that the transfer sought was legal under the FCC's rules since no fee was to be paid for the numbers at issue.

Of course, such a decision has no precedential value over the FCC. As the Bureau noted with regard to the Arizona federal district court decisions in this proceeding, "[w]e note that the Commission was not a party to the arbitration or litigation, and is not bound by those decisions. Thus, those decisions did not alter any Commission precedent regarding the transfer of toll free

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<sup>40</sup> See Application for Review at 8-10.

numbers.” Declaratory Ruling at ¶ 6. In addition, the *Ford Motor* court asserted that at the time of its decision, “the Bureau has yet to clarify the interpretation of the FCC regulations contained in the [FCC] letter [regarding toll free number transfers].”<sup>41</sup> That is of course not the case here, where the Bureau’s Declaratory Ruling has provided just such a clarification.

Perhaps even more consequential is the simple fact that the *Ford Motor* court reached an obviously erroneous result, since, among other things, it failed to note that the SMS/800 Tariff explicitly prohibits toll free number transfers regardless of whether a “fee” is involved.<sup>42</sup>

In short, the court’s decision in *Ford Motor* was plainly wrong in its interpretation of the law, and holds no precedential value for the FCC in any event. In fact, if there is a lesson to be learned from the *Ford Motor* decision, it is that the judge should have acknowledged the FCC’s primary jurisdiction and obtained the FCC’s assistance in reaching the correct result. Here, the Bureau’s Declaratory Ruling provides the clarification that the *Ford Motor* court sorely missed, and it makes little sense to suggest that the expert agency with primary jurisdiction over toll free numbers should look to those without such expertise and authority for guidance.

Similarly, EPS’s cryptic reference to 855 numbers being freely transferrable is nonsensical.<sup>43</sup> The sole “authority” EPS cites for this proposition is a document from a private entity, not the FCC, and that document relates to NXX codes rather than to toll free numbers. As a result, both the document and EPS’s claims relating to it are entirely irrelevant to this proceeding.

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<sup>41</sup> The FCC letter being referred to is *In re Modifying SMS/800 Disconnect and Suspend Status Functions to Preclude Transfers of Toll-Free Numbers Directly Between Subscribers*, 15 FCC Rcd 24053 (CCB 2000).

<sup>42</sup> See SMS/800 Tariff at § 2.3.1(A)(7).

<sup>43</sup> Application for Review at 6-7.

Finally, EPS attempts to argue that the Declaratory Ruling is somehow undercut because, EPS asserts, TSYS's contracts with RespOrgs contain language relating to the assignment of those contracts or of toll free numbers.<sup>44</sup> However, even a cursory review of the provisions referenced reveals that, at most, they merely allocate authority over assignments *as between TSYS and its RespOrg*. As a result, the purpose of such provisions is to merely ensure that if FCC authority for a transfer is sought (e.g., where a matter of public safety is involved), it is TSYS, and not the RespOrg, that has the contractual right to make that decision. As with its other arguments, EPS fails to demonstrate what possible relevance this has to the Declaratory Ruling.

### **Conclusion**

The EPS Application for Review fails to meet any of the fundamental legal thresholds for such a filing. It fails to demonstrate any error in the Declaratory Ruling, it fails to establish that the changes in the Commission's rules that it seeks are in any way available in this proceeding, and it fails to demonstrate that creating a unique new exception to the Commission's Rules for the benefit of EPS would in any way promote the public interest, as opposed to merely undercutting the very purpose of the Commission's rules. With regard to this last point, it is also clear that EPS's goal in seeking the transfer of TSYS's toll free numbers is to accomplish the precise result—hoarding and brokering of toll free numbers—that the Commission's rules were designed to prevent. Thus, contrary to EPS's claims, this is not a situation where an FCC rule of general applicability accidentally "sweeps too broadly". Instead, the very purpose of these rules is to prevent the result EPS is seeking. The Declaratory Ruling correctly recognized that, and the

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<sup>44</sup> Application for Review at 7-8.

Application for Review provides the Commission with no reason to disturb the Bureau's result.

For these reasons, the Application for Review should be denied.

Respectfully submitted,

**TSYS ACQUIRING SOLUTIONS, LLC**

By: 

Scott R. Flick  
Glenn S. Richards

Its Counsel in this Matter

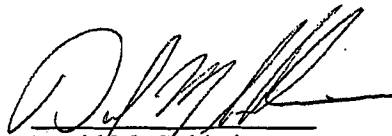
PILLSBURY WINTHROP SHAW PITTMAN LLP  
2300 N Street, N.W  
Washington, D.C. 20037  
(202) 663-8000

Dated: April 8, 2011

**Declaration of David M. Goldwin**

I, David M. Goldwin, do hereby declare under penalty of perjury that the following is true and correct:

1. I am the Senior Associate General Counsel of TSYS Acquiring Solutions, LLC. In that position, I have been extensively involved in the company's dealings with Electronic Payment Systems, LLC.
2. I have reviewed the attached "Opposition to Application for Review." Except for (a) matters cited therein contained in the FCC's records, (b) matters for which other support is provided, and (c) matters of which the Commission may take official notice, the facts set forth therein are true and correct to the best of my personal knowledge and belief.

  
David M. Goldwin

Dated: April 7, 2011

# **EXHIBIT A**



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6

7  
8 **IN THE UNITED STATES DISTRICT COURT**  
9 **FOR THE DISTRICT OF ARIZONA**  
10

11 TSYS ACQUIRING SOLUTIONS, LLC,

12 Plaintiff,

13 v.

14 ELECTRONIC PAYMENT SYSTEMS, LLC

15 Defendant.  
16

Case No. 2:09-cv-00155-JAT

**DEFENDANT ELECTRONIC PAYMENT  
SYSTEMS, LLC RESPONSE TO  
PLAINTIFF'S RULE 59(e)  
MOTION/MOTION FOR  
RECONSIDERATION OF JANUARY 29,  
2011 ORDER (DOC. 102) AS MODIFIED  
BY FEBRUARY 15, 2011 ORDER (DOC.  
108)**

17  
18 Defendant, Electronic Payment Systems, LLC, ("EPS") hereby submits this response to  
19 TSYS Acquiring Solutions, LLC ("TSYS"), Plaintiff's Rule 59(e) Motion/Motion for  
20 Reconsideration of January 29, 2011 Order (Doc. 102), as Modified by February 15, 2011 Order  
21 (Doc. 108) as follows:  
22

23 **I. INTRODUCTION**

24 TSYS lost in the arbitration, lost in the confirmation/vacatur proceedings, lost in the  
25 declaratory judgment action, and lost at the enforcement stage of this case. Yet, EPS is no  
26 closer to receiving what it was awarded two years ago. Not a single non-EPS merchant has been  
27 moved off the EPS numbers and EPS remains at the mercy of TSYS. Although the Court  
28 expressly found that TSYS has continuously and strenuously refused to comply with the Court's

1 orders, no sanctions have been imposed. As a result, TSYS persists in its habitual conduct of  
2 noncompliance, in utter disregard of this Court's orders and judgment, and TSYS has not  
3 suffered a single consequence for doing so. TSYS's efforts to get the FCC to interfere with the  
4 Court's judgment are but the latest in a long line of improper acts by TSYS - acts that TSYS has  
5 unequivocally demonstrated will continue unless and until TSYS is sanctioned for its disregard  
6 of the Court's directives and is forced to remove all non-EPS merchants from the EPS numbers  
7 and to transfer control of the EPS numbers to EPS.

8 Blatantly exaggerating the scope and effect of an FCC staff's ruling, TSYS has filed  
9 motions to stay the Court's enforcement and asks the Court to reconsider its Order. TSYS  
10 incorrectly asserts in its motions that "this Court's interpretation of the arbitrator's award is  
11 illegal;" "the Court's orders are erroneous;" "EPS cannot obtain from TSYS control over the  
12 seven toll free numbers EPS' merchants currently use;" "the FCC will never allow the transfer  
13 of toll free numbers that EPS seeks;" "the goal of the Court's Orders is now legally foreclosed"  
14 by the staff's ruling; the staff's ruling "has mooted the Court's Orders and rendered those Orders  
15 manifestly erroneous and manifestly unjust;" and "Option One is the only way that the toll free  
16 number portion of the Arbitrator's Award and Amended Judgment can be effectuated." TSYS  
17 would have the Court believe that a ruling by FCC staff purporting to restate what the FCC  
18 regulations provide regarding transfer of subscriber interests in 800 numbers completely  
19 eviscerates what the arbitrator intended to accomplish and renders the Court powerless to carry  
20 out the arbitrator's intent. Once again, TSYS has seriously misrepresented matters to the Court.

21 The reality is the arbitrator entered an award clearly manifesting his intent that (1) the  
22 existing EPS numbers be made unique to EPS and (2) to the maximum extent permitted by law,  
23 TSYS' interest in the EPS numbers are to be conveyed to EPS. There is nothing unlawful or  
24 unenforceable or contrary to public policy in that award. Nor is there anything in the ruling by  
25 FCC staff that abrogates this fundamental intent of the arbitrator or the ability of this Court to  
26 fulfill its obligation to carry out such intent and enforce the Court's judgment.

1       The FCC staff's ruling has absolutely no impact on the first of the Court's two step  
2 process to carry out the arbitrator's intent, which is to make the existing EPS numbers unique to  
3 EPS merchants by moving non-EPS merchants to other numbers. After that has been  
4 accomplished the second step is to transfer control of the numbers to EPS. This step can be  
5 accomplished in a variety of manners, one of which is to transfer TSYS' subscriber interest to  
6 EPS. At most, the staff's ruling adds one more requirement, FCC approval, if the Court orders  
7 this method to give EPS control over the numbers. Once transfer of non-EPS merchants off the  
8 EPS numbers is complete and the matter is presented to the FCC in the proper manner at the  
9 proper time, with TSYS' consent and support, FCC approval is likely, and certainly not  
10 impossible. If FCC approval is delayed or denied however, the arbitrator's award allows the  
11 Court latitude to carry out the arbitrator's intent in a variety of manners which do not involve  
12 FCC regulations.

## 13   **II.   STATEMENT OF FACTS**

14       TSYS was convicted by the arbitrator of wrongfully depriving EPS of its 1-800 number.  
15 TSYS' conviction has been affirmed by two Judges of this Court. Having no place else to hide,  
16 in order to avoid the orders and judgments of this Court, TSYS now seeks asylum with the FCC.  
17 On January 24, 2011, TSYS unilaterally sought a ruling from the Wireline Competition Bureau  
18 of the FCC to interfere with the Court's judgment and the arbitrator's award. Based on TSYS'  
19 jaundiced presentation of the matter, the staff within the FCC issued a ruling on February 24,  
20 2011.

21       Contrary to TSYS' assertions, the FCC staff's ruling does not invalidate the Court's  
22 orders that the EPS 1-800 numbers be made unique to EPS, nor the Court's requirement that  
23 control of the numbers be transferred to EPS. It merely indicates that the second step, TSYS'  
24 transfer of its subscriber interest in the EPS numbers, may require FCC approval.

25       The staff's ruling expressly notes that it takes no position on other remedies that may be  
26 appropriate in this matter. "The Bureau also notes that its ruling is not intended to create new  
27 law, but merely to "reiterate[] its rules regarding the distribution and transfer of numbers." (Staff  
28

1 ruling, Sec. 9, p. 4)<sup>1</sup>

2       The issue of federal regulations was previously addressed in the disputes between TSYS  
3 and EPS. Judge Campbell's November 9, 2010 Order dismissing TSYS' case in the declaratory  
4 action, identified six matters TSYS sought to raise to avoid complying with this Court's  
5 judgment and order, including:" . . . (4) that the numbers are controlled by organizations  
6 regulated under federal law, not by TSYS...." (Declaratory Case, 11/09/10 Order, Doc. No. 58,  
7 p. 5) (emphasis added). Judge Campbell stated that each of these matters were "a defense, not an  
8 interpretation, that TSYS really seeks to assert in this case." (Declaratory Case, 11/09/10 Order,  
9 Doc. No. 58, p. 6). Judge Campbell held that the time for TSYS to present its defenses,  
10 including its defense related to federal regulatory authority, was before the arbitrator, or at least  
11 before Judge Teilborg in the vacatur proceedings. *Id.* Having failed to do either, Judge  
12 Campbell ruled, "TSYS is barred from raising defenses to [EPS's] claim that could have been  
13 asserted in the prior proceedings." *Id.*

14  
15  
16  
17       <sup>1</sup>The staff's ruling indicates that any transfer of a subscriber interest requires prior FCC  
18 approval. Such a literal reading of the FCC's "first come, first served" 800 number assignment  
19 policy is inconsistent with common industry practice and is wholly impracticable. That reading,  
20 if adopted by the FCC, would require that even in instances involving mergers, acquisitions, or  
21 other voluntary agreements entered into to facilitate the uninterrupted continuation of businesses,  
22 prior FCC approval is required to change the subscriber. Such an interpretation is contrary to  
23 existing FCC policy and practice which, as discussed below, allow voluntary transfers without  
24 FCC involvement other than notification. If the staff's ruling were to go unchallenged, tens of  
25 thousands of commercial transactions throughout the United States each year would come to a  
26 grinding halt, as each merger, acquisition or dissolution involving a change in the official  
27 subscriber to an 800 toll free number would require the FCC's approval before the RespOrg  
28 could move the number. The fact that no merger, acquisition or transfer of business interests  
ever includes such a request to the FCC, and that RespOrgs routinely implement all such  
subscriber name changes without FCC involvement, provides ample evidence that industry  
practice, common sense, and the FCC's more flexible interpretation of "first come, first served"  
permits transfers without approval in such instances. To avoid the staff ruling's impractical and  
excessively regulatory, literal reading of the FCC policy and to ask the FCC to confirm that there  
are transactions that are consistent with FCC policies and do not require prior approval for  
subscriber changes, such as mergers, acquisitions, Court orders, or voluntary agreements such as  
that involved in this case, EPS anticipates appealing the ruling by filing an application for review  
with the Commission pursuant to 47 C.F.R. §1.115.

1 **III. SUMMARY OF ANALYSIS**

2 TSYS seeks to raise yet another defense that should have been raised, if at all, before the  
3 arbitrator or at least during the vacatur/confirmation proceedings. TSYS is now barred from  
4 doing so by res judicata, the Federal Arbitration Act and Fed.R.Civ.P. 59(e). In addition to being  
5 procedurally flawed, TSYS' argument based on the ruling of a staff bureau in the FCC is  
6 substantively without merit. There is nothing impossible about doing what the arbitrator  
7 intended. The Court has ordered a two step process to carry out the arbitrator's intent. The first  
8 step is for TSYS to, with rapidity, move all non-EPS merchants off the EPS numbers. This step  
9 does not involve the FCC and the staff's ruling has no impact on it. Nonetheless, TSYS has  
10 refused to move a single merchant. The second step ordered by the Court once only EPS  
11 merchants remain on the EPS numbers, is to transfer all of TSYS' interest in the EPS numbers to  
12 EPS to the full extent permitted by law. Step two can be accomplished through a variety of  
13 methods, many of which do not implicate FCC policies. The only effect of the staff's ruling is  
14 that in the event transferring TSYS' interest in the EPS numbers to EPS is to be accomplished by  
15 transferring TSYS' subscriber interest to EPS, then FCC approval may be necessary. Once the  
16 non-EPS merchants have been removed from the EPS numbers, and the proper facts and  
17 circumstances are presented to the FCC, rather than those misportrayed by TSYS, the FCC is  
18 likely to approve the subscriber transfer. If not, the Court can utilize other methods not  
19 involving the FCC to implement the intent of the arbitrator. In any event, the remedy TSYS now  
20 seeks has already been rejected by the Court as contravening the arbitrator's intent. At the end of  
21 the day, it is time to send a clear message to TSYS that they are not above the law and this Court.  
22 It is time for EPS to receive what it has been awarded and it is time to hold TSYS in contempt.

23 **IV. ANALYSIS**

24 **A. Having failed to raise the FCC regulations before the arbitrator or in the**  
25 **confirmation/vacatur proceedings, TSYS is barred by res judicata, the**  
**Federal Arbitration Act and Rule 59 from doing so now.**

26 In its latest avoidance tactic, TSYS asserts the same defenses for enforcing the  
27 arbitrator's award and the Court's judgment that Judge Campbell has already rejected. In the  
28 declaratory judgment case, TSYS argued the award and judgment are unenforceable because

1 “the [800] numbers are controlled by organizations regulated under federal law, not by TSYS,”  
2 referring *inter alia* to the FCC and related federal regulations. (Declaratory Case, Doc. No. 51,  
3 p.6). Judge Campbell held *res judicata* is governed by Arizona law, *Semtek Int’l, Inc. v.*  
4 *Lockheed Martin Corp.*, 531 U.S. 497, 507-508 (2001). Arizona law bars every defense raised  
5 or which could have been raised. *Hall v. Lalli*, 977 P.2d 776, 779 (Ariz. 1999) Judge Campbell  
6 ruled that TSYS’ arguments, including its argument based on federal regulatory law, were  
7 defenses that TSYS failed to raise before the arbitrator and were therefore barred by *res judicata*.  
8 The staff ruling indicates it did nothing to change the law in this area. Thus, TSYS could have  
9 raised its defense based on the federal regulatory laws before either the arbitrator or Judge  
10 Teilborg. Having failed to do either, it is barred from doing so now.

11 Likewise, TSYS’ claim is barred by the Federal Arbitration Act, 9 U.S.C. §§1 et seq.  
12 (FAA). TSYS’ motion seeks to have the Court declare the arbitrator’s award “illegal” and  
13 “erroneous” and to modify or vacate it. Motions to vacate or modify an arbitration award are  
14 governed exclusively by the FAA. 9 U.S.C. §12 (2011). Arbitration under the FAA is to be  
15 expeditious, inexpensive, and final. Reflecting these goals the FAA requires that any motion to  
16 modify or vacate an arbitrator’s award must be filed within three months of the date the award is  
17 filed or delivered. *Id.* TSYS’ motion is two years too late.

18 For many of the same reasons, TSYS claim fails under Rule 59(e). A Rule 59(e) motion  
19 must be denied if (1) there is no newly discovered evidence, (2) the court’s decision is not clearly  
20 erroneous or manifestly unjust, and (3) there is no intervening change in controlling law. *Turner*  
21 *v. Burlington N. Santa Fe R.R. Co.*, 338 F.3d 1058, 1063 (9<sup>th</sup> Cir. 2003). TSYS raises the same  
22 “evidence” it has raised ad nausem, nothing new. There is nothing clearly erroneous or  
23 manifestly unjust about the Court’s order implementing what the arbitrator intended. To the  
24 extent TSYS asserts the staff’s ruling is a change in controlling law, TSYS ignores the plain  
25 language of the ruling, which says it merely reiterates the existing rules, it does not change them.

1           **B.     The Court's order enforcing its judgment is not precluded by the staff's**  
2           **ruling.**

3           Since the case has progressed to a non-appealable judgment, the only possible relevance  
4           of the FCC staff ruling at this point is whether it makes enforcement of the Court's judgment  
5           "impossible." To establish such impossibility it is TSYS' burden to show "categorically and in  
6           detail" that compliance is "factually impossible." *United States v. Rylander*, 460 U.S. 752  
7           (1983), and *NLRB v. Trans. Ocean Export Packing, Inc.*, 473 F.2d 612, 616 (9<sup>th</sup> Cir. 1973). For  
8           the reasons set forth below, the staff's ruling clearly does not render compliance with the Court's  
9           judgment impossible.

10          The Court's enforcement order, which implements the arbitrator's intent, involves a two  
11          step process. Step one requires TSYS to move all non-EPS merchants off the EPS 1-800  
12          numbers thus making the EPS 1-800 numbers unique to EPS. Step two requires TSYS to  
13          transfer control of the EPS numbers to EPS. The ruling by FCC staff does not prevent the  
14          accomplishment of step one or step two. At most, TSYS' most recent improper conduct has  
15          made one method of accomplishing the second step of the Court's order more difficult, but not  
16          impossible.

17          **STEP ONE:** TSYS moves all non-EPS merchants off EPS' numbers. It is well within  
18          the authority of the Court to order TSYS to move all non-EPS merchants off the EPS numbers  
19          and onto other numbers. TSYS does not dispute this. The staff's ruling has absolutely no affect  
20          on this part of the Court's order, as no FCC regulations are implicated. As discussed below,  
21          there are a variety of ways to accomplish step two. However, completion of step one, moving  
22          the non-EPS merchants off the EPS numbers, is a required predicate to each of the alternate ways  
23          to accomplish step two. To fulfill the arbitrator's intent the Court must stand firm on its order to  
24          impose sanctions on TSYS if it does not comply with step one immediately.

25          Initially, the FCC regulates the manner in which the 1-800 numbers are assigned. The  
26          FCC also "monitors" the transfer of 1-800 numbers from one entity, whether RespOrg or  
27          subscriber, to another. However, once the 1-800 number has been assigned to a particular  
28          subscriber through a RespOrg, the FCC's involvement ends. The FCC is not involved in

1 determining which customers of the subscriber or ultimate end users of the 1-800 numbers are  
2 allowed to use the number, so long as there is no brokering, or hoarding, or other violation of  
3 FCC regulation involved.

4       There is nothing in the FCC's regulations nor the staff's ruling that even purports to  
5 dictate which merchants, EPS versus non-EPS, are allowed to utilize the EPS 1-800 numbers.  
6 That is strictly a matter of agreement between the subscriber, TSYS, and its customer, EPS. For  
7 the FCC to become involved in the specifics of the use of numbers would be the antithesis of  
8 "first come, first served." The FCC has expressly refused to become involved in such issues on  
9 several occasions. For example, the FCC refused requests to make special provisions for the  
10 assignment of newly released toll-free numbers that matched existing numbers (e.g., 877-  
11 FLOWERS would be assigned to the holder of 800-FLOWERS). Instead, the FCC chose to  
12 adhere to its "first come, first served policy on numbers without regard to the use to which the  
13 numbers are put. Here, as determined by the arbitrator and enforced by the Court, TSYS agreed  
14 the EPS numbers would be unique to EPS merchants. The Court's enforcement of that contract  
15 by requiring TSYS to remove non-EPS merchants from the EPS merchants is beyond the pale of  
16 the FCC.

17       TSYS' unsupported assertion that moving the non-EPS merchants off the EPS 1-800  
18 numbers, violates FCC regulations because it would result in hoarding is incorrect. Hoarding  
19 does not involve counting how many ultimate customers use a number. Hoarding involves  
20 whether all of the numbers a subscriber holds are actually being used. 47 C.F.R. §52.107. TSYS  
21 has represented to the Court that there are seven numbers used to provide service to EPS'  
22 merchants. The Court has ordered TSYS to give EPS control over all seven numbers, to enable  
23 EPS to continue to use the numbers for existing merchants, as well as those to be added in the  
24 future. All seven numbers will continue to be used by EPS merchants, exactly as they are now.  
25 There is no hoarding.

26       **STEP TWO:** TSYS transfers control over the EPS 1-800 numbers to EPS. This can be  
27 accomplished in a variety of manners, some of which do not involve the FCC, and none of which  
28 are impossible under the staff's ruling. The main thrust of TSYS' motion relates to Step 2 of the



1 Court's Order. TSYS' arguments and its actions in connection with Step 2 are at best unfounded  
2 speculation, and at worst contemptuous chicanery.

3 **1. Once the EPS 1-800 numbers are made unique, serving only EPS**  
4 **merchants, the FCC is likely to approve the transfer of the subscriber**  
5 **interest to EPS, despite TSYS' efforts to undermine the Court's order.**

6 TSYS presented a very jaundiced picture of the present case to the FCC, spending the  
7 majority of its petition portraying the non-EPS merchants as the victims of a merciless EPS that  
8 simply wants to take the 800 numbers out from under them and interfere with their ability to  
9 process transactions. TSYS NEVER disclosed to the FCC (1) that the non-EPS merchants are in  
10 this predicament due SOLELY to the misdeeds of TSYS, (2) that TSYS has (despite court order)  
11 refused for more than two years to solve the problem it created by moving the non-EPS  
12 merchants to other 1-800 numbers, or (3) that once the non-EPS merchants are moved, the risks  
13 that TSYS complains of are completely eliminated.

14 TSYS petitioned the FCC without even attempting to undertake Step 1 of the Court's  
15 order. By prematurely putting Step 2 ahead of Step 1, and mischaracterizing this as a forced,  
16 rather than a voluntary, transfer. The issue TSYS presented to the bureau was:

17 While TSYS has 750,000 merchants using the numbers, can TSYS be forced to  
18 transfer its subscriber interest in the numbers to EPS?

19 The answer TSYS received was:

20 No transfer of a subscriber interest can take place without FCC approval, and a  
21 forced transfer of the numbers has only been approved by the FCC in extreme  
22 circumstances.

23 The proper issue to be presented to the FCC after TSYS has removed the non-EPS  
24 merchants is worlds apart from TSYS' premature inquiry. After Step 1 is completed, the FCC  
25 should be asked the following 2 questions:

26 Question #1: In 2005, could TSYS have initially subscribed EPS to 800 numbers  
27 by making EPS the subscriber of record rather than taking the numbers in TSYS'  
28 own name?

and

1 Question #2: Now that only EPS merchants are on these 1-800 numbers, will you put the  
2 parties in the same position as they would have occupied if TSYS had done what it was  
3 obligated to do in 2005 - will you allow EPS to be the subscriber of those numbers as it  
4 should have been all along?

5 TSYS concedes the answer to the first question is yes. TSYS represents to the Court it  
6 can go the FCC today and get two or more virgin numbers to use solely for EPS merchants. In  
7 fact, it asks the Court for permission to do precisely that. If TSYS can do it now, TSYS could  
8 have done the same thing in 2005.

9 To answer the second question, the FCC would determine whether the transfer violates  
10 any FCC regulation or policy? For example, does it involve brokering? No. Brokering is  
11 defined in the FCC rules 47 C.F.R. §52.107(a)(2), as the sale or other transfer of a telephone  
12 number for remuneration. This typically arises in the context of a "vanity" number, such as 800-  
13 FLOWERS or 800-JAGUAR. In this case, there is no remuneration, nor even a rationale for one  
14 to be sought. There is nothing unique or attractive about the specific numbers in dispute, except  
15 that they are used to service EPS' merchants. None of the elements of brokering are present. Is  
16 it hoarding? No. As explained above, hoarding involves claiming numbers without an intent to  
17 use them. Here, the numbers are already in use and will continue to be so. Since no FCC  
18 regulations are compromised by the transfer, there is no reason for the FCC to deny it. *Ford*  
19 *Motor Co. v. United States Auto Club*, 2008 U.S. Dist. LEXIS 74198 (N. Dist. Tex.  
20 2008)(transfer of subscriber interest in toll-free numbers is prohibited only if it would violate  
21 FCC regulations regarding hoarding, brokering, or sale).

22 Under the circumstances that should be presented to the FCC, allowing TSYS' subscriber  
23 interest to be transferred to EPS has no different impact or affect under FCC policies, than  
24 allowing a subscriber's interest to be transferred as part of a merger or acquisition. Not only are  
25 subscriber interest transfers commonplace without prior FCC approval as part of a merger or  
26 acquisition, official guidelines for 855 numbers (toll free numbers available to hearing impaired  
27 individuals) expressly describe a process for giving after-the-fact notification (without approval)  
28 of subscriber changes in such cases. (See Atis-0300048, 555 NXX Assignment Guidelines,

1 Section 6.5, November 12, 2010, available at <http://www.atis.org/inc/docs/.asp> ). There is no  
2 basis for applying a different rule for other types of 800 numbers. The only requirement in the  
3 acquisition/merger setting is that the FCC be notified of the change. *Id.*

4       Allowing a subscriber to transfer its interest as part of a merger or acquisition, so long as  
5 there is no brokering, hoarding, warehousing, is good public policy. It facilitates voluntary  
6 commercial transactions between consenting business entities and enables businesses to continue  
7 operating without interruption. If every sale of a business that holds a toll-free number required  
8 prior FCC approval, the wheels of commerce would grind to a halt and the FCC would need a  
9 Bureau of Toll-Free Subscriber Change Approvals. Instead, a more practical model is the  
10 industry practice. For example, when Ford sold Jaguar to Tata Motors, the Court ordered the  
11 roadside assistance provider to transfer the number 800-JAGUAR to the new owner of the  
12 company at Ford's request because it was part of the business, was printed in owner's manuals,  
13 and so on. See discussion of *Ford* case, below. The FCC was not asked, nor did it give, prior  
14 approval for that change. (See discussion of *Ford* case, below.) The same is true of the  
15 agreement that is being enforced in this case between EPS and TSYS, as determined by the  
16 arbitrator. The 800 number agreement was voluntarily entered into between EPS and TSYS, to  
17 ensure the uninterrupted continuation of EPS' business and the ability of its tens of thousands of  
18 merchants to process transactions without interruption in the event EPS ever needed or desired to  
19 move its merchants. In fact, once the EPS numbers are unique to EPS, the way to protect the  
20 only users of the EPS numbers, is to approve the transfer of the subscriber interest to EPS, so it  
21 can quickly move to a new processor without having to re-contact EPS merchants. Under these  
22 circumstances, which should ultimately be presented to the FCC, approval seems likely and is  
23 certainly not "impossible."

24       The FCC is particularly likely to grant the application, where as here, it should be made  
25 jointly, not with opposition from TSYS, but with TSYS' full cooperation, consent and assistance.  
26 As discussed below in Section IV. E., those are the actions required of TSYS as the losing party  
27 in an injunction judgment, rather than the resistant obstructionism TSYS has demonstrated for  
28 the past two years.

Approval of the transfer by the FCC is also consistent with case law in this area which has expressly approved transfers of subscriber interests like that involved in the present case. The case most similar to the present is *Ford Motor Co. v. United States Auto Club, Id.* In *Ford*, Jaguar (as part of Ford) and Land Rover (collectively, the "Car Companies") provide roadside assistance to their customers, by outsourcing it to a third party provider. Auto Club was the initial third party provider. The Car Companies transferred to Auto Club the five toll free numbers that appear in the Car Companies' literature, so Auto Club could answer the customers' calls. Later, the Car Companies terminated the contract with Auto Club, and contracted with a new third party service provider, Cross Country, to provide the service. The Car Companies requested that Auto Club transfer the toll free numbers to the new service provider, but Auto Club refused. The contract between the Car Companies and Auto Club did not expressly require such transfer. The Car Companies sued seeking the transfer of the numbers, despite the absence of any contractual obligation for such transfer. Auto Club defended on the basis that the FCC's rules do not provide for direct transfer of numbers between subscribers. Like the present case, *Ford* also involved an FCC staff letter that could have been construed to prevent the transfer.

The Court rejected Auto Club's argument and held that transfer of numbers are prohibited only if they violate the regulations by allowing hoarding, brokering, or sale of a toll free number:

The plain language of the regulation prohibits three things: (I) the acquisition of more toll free numbers than the subscriber intends to use for providing toll free service, (ii) the acquisition of a toll free number for the purpose of selling it to another person or entity for a fee, and (iii) the selling of a toll free number by a private entity for a fee. at (2008 U.S.Dist. LEXIS 74198 at\*12).

The Court compelled the transfer of the numbers to the new service provider. Such use facilitated providing service to the customers without interruption and did not violate FCC regulations. *Id.* The Court makes no mention of any need for FCC approval. In fact, the Court eludes to the fact that in order to effectuate a transfer of subscriber interest, the parties merely need to sign a "transfer of service agreement" to reflect that the

1 assignment is voluntary and not in violation of FCC rules. *Id.*

2       The Car Companies in *Ford* changed from one third party service provider to another,  
3 just as EPS seeks the ability to change from one third party processor to another. The purpose of  
4 the transfers in both cases are the same - to ensure that those customers using the numbers can  
5 continue to do so without interruption. EPS' claim to a right to transfer the numbers is even  
6 more compelling than the Car Companies in *Ford*. In *Ford* there was no contractual obligation  
7 to transfer the numbers. Here, the arbitrator determined there was an express agreement by  
8 TSYS to transfer TSYS' interest in the numbers to EPS. As in *Ford* there is nothing to indicate  
9 hoarding as EPS clearly intends to use all seven numbers to continue to service its merchants;  
10 there is no brokering as the numbers were obtained to provide service to EPS' merchants, not to  
11 sell them to EPS; and there has been no sale of the numbers, as EPS has paid no separate  
12 consideration to TSYS for its commitment to convey the numbers to EPS. If the transfer was  
13 compelled in *Ford* it should clearly be permitted in the present case.

14       The FCC's regulation that is at the heart of the present controversy provides on its face  
15 for exceptions and waivers. The first-come, first served rule is set forth in Section 52.111, which  
16 provides: "Toll free numbers shall be made available on a first-come, first-served basis, unless  
17 otherwise directed by the Commission." (emphasis added). The staff's ruling also expressly  
18 recognizes the FCC has the latitude to allow the transfer. More importantly, the ruling does not  
19 indicate a complete bar of the transfer from TSYS to EPS, as TSYS would have the Court  
20 believe. It merely requires that the FCC approve the transfer. (Ruling, Sec. 1, p.1) ("The Bureau  
21 affirms...that under the Commission's rules, Responsible Organizations (RespOrgs), may not  
22 transfer toll free numbers directly from one entity to another without Commission approval.").  
23 Thus, transfer of the EPS numbers is possible.

24       TSYS argues the FCC will never exercise its discretion to allow the transfer of the EPS  
25 numbers to EPS. In support of its argument, TSYS relies on cases and rulings (Hurricane  
26 Katrina and SUICIDE hotline cases) whose dissimilarity to the present case borders on absurdity.  
27 Those cases involved forced transfers from an existing subscriber who had not agreed to transfer  
28 the number to the new subscriber. Here there is no forced transfer or reassignment of the

1 numbers, as TSYS voluntarily contracted to provide the toll free numbers to EPS. Even in *In the*  
 2 *matter of Toll Free Service Access Codes*, 22 FCC Rcd 651 (2007) (the SUICIDE hotline ruling),  
 3 the FCC recognized that in some circumstances numbers may be transferred by voluntary  
 4 agreement of the parties. Footnote 3 of the *In re Toll Free Service* ruling indicated the hope of  
 5 the FCC that the parties could negotiate a solution to transfer certain numbers. Additionally,  
 6 Section 6 of the ruling indicated the FCC would revisit the matter in a year to whether “any  
 7 permanent agreement [was] negotiated between the parties.” More importantly, the present case  
 8 is far removed from the compelled transfer setting involving preservation of human life that was  
 9 involved in the SUICIDE matter. This case involves a voluntary commercial agreement entered  
 10 into to preserve the ability of a business to continue operating without interruption, much like  
 11 the merger and acquisition setting or the facts involved in the *Ford* case.

12 TSYS vehemently represents to the Court (and the FCC) that it does not believe the EPS  
 13 numbers can be moved from one subscriber to another. Once again, TSYS is not being candid  
 14 with the Court or the FCC. TSYS has entered into contracts with both of its RespOrg/providers  
 15 that expressly authorize such transfers. The TNS contract allows TSYS to do it unilaterally,  
 16 without TNS’ consent. (See discussion in Doc. No. 85, pp. 9-10) The Verizon contract allows  
 17 TSYS to require a transfer of the numbers with Verizon’s consent, which consent cannot be  
 18 unreasonably withheld. (See discussion in Doc. No. 85, pp. 11). Neither contract makes any  
 19 provision for FCC approval of such transfers, before or after they occur. TSYS, of course, failed  
 20 to disclose to the FCC these contractual provisions that TSYS has agreed to that are  
 21 diametrically contrary to the position TSYS now asserts before the Court and the FCC.

22 **2. Once the EPS numbers are unique to EPS merchants, the Court can**  
 23 **order that EPS be given control over the numbers through any one of**  
 24 **several available mechanisms, some of which do not involve the FCC.**

25 Simply because one method of implementing the arbitrator’s award and the Court’s  
 26 judgment may not be available or may take time to achieve does not limit the ability of the court  
 27 to utilize other remedies to effectuate the arbitrator’s intent. Even the staff’s ruling recognized  
 28 that it takes no position on other remedies that may be appropriate in this matter. (Staff ruling,  
 Section 9, page 4)

1           Approval of a transfer of TSYS' subscriber interest to EPS may be the preferred remedy.  
2 But it is by no means the only method to give EPS control over the EPS numbers once they are  
3 made unique to EPS. For example, the subscriber of the number has discretion to move its  
4 numbers from one RespOrg or carrier to another. *Beehive Tel. Co., Inc. v. FCC*, 179 F.3d 941  
5 (D.C.Cir. 1999). One option available to the Court is to order that TSYS exercise this discretion  
6 subject to and only as directed by EPS. Since there would be no exchange of money, no transfer  
7 of subscriber interest, no accumulation of unused numbers, no FCC policies would be  
8 implicated. At the same time, this would provide the control over the EPS numbers the arbitrator  
9 intended EPS to have. This order by the Court could remain in place so long as TSYS remained  
10 the subscriber and would expire if and when the FCC approved the transfer of TSYS' subscriber  
11 interest to EPS. If the FCC denied the parties' joint application for transfer, then the Court's  
12 order could remain in effect unless and until the parties agreed that it be modified, if ever.

13           Case law confirms there are several other ways to accomplish step two without FCC  
14 involvement. *In re StarNet, Inc.*, 355 F.3d 634 (7<sup>th</sup> Cir. 2004) involved the use of "portability"  
15 - the ability to move an 800 number from one location to another. Portability is encouraged by  
16 the FCC and does not require specific approval. *Beehive*. The numbers in *StarNet* were obtained  
17 by StarNet from a carrier and provided to customers of Internet Service Providers (such as AOL)  
18 to use in accessing the internet, just like the EPS merchants use the numbers in their terminals to  
19 access a processor. StarNet sought approval to move the numbers from the existing carrier to a  
20 new carrier. Although the Court in *StarNet* did not reach the ultimate decision of whether  
21 StarNet could move the numbers to a new carrier, because it decided it first needed clarification  
22 from the FCC on the meaning of "location," the Seventh Circuit made several determinations.  
23 The Court indicated the numbers could be "ported" or moved to a new carrier where (1) the  
24 parties' contract provides for portability of the numbers, (2) despite the absence of a contractual  
25 provision, the parties agree to move the numbers, or (3) the new location where the numbers are  
26 ported to is in the same rate zone as the old location. The present case falls within at least two  
27 of these categories. In 2005 TSYS specifically agreed to transfer control of the EPS numbers to  
28 EPS so it could move them, i.e. port them, to a new processor, other than TSYS if it needed or

1 wanted to do so. In addition EPS anticipates it will utilize the services of a new processor  
2 located in the Phoenix area, the same rate zone as where TSYS is located in Tempe. Therefore,  
3 portability is one alternate means of achieving what the arbitrator intended, as the Court can,  
4 without involving the FCC, order that TSYS port the EPS numbers where directed by EPS  
5 immediately upon request by EPS.

6 Another alternative means of accomplishing Step 2 is through the use of a routing  
7 agreement as envisioned by the Court in *The Business Edge Group, Inc.* ("TBEG") v.  
8 *Champion Mortgage Co., Inc.*, 2005 U.S. Dist. LEXIS 36585 (Dist. N. J. 2005). There,  
9 TBEG had a toll free number that was the mnemonic 1-800-Champion. Champion  
10 Mortgage wanted to use the number. The parties entered into an agreement pursuant to  
11 which TBEG agreed to route all calls received on the number to Champion. The Court  
12 invalidated the routing agreement, not because routing is improper, but because (1)  
13 TBEG originally obtained the number not for its own use, but to try to market it to a  
14 company with Champion in its name (brokering), and (2) the amount Champion paid  
15 TBEG under the "routing agreement" far exceeded the value of the services and were  
16 obviously paid in large part to buy the number (sale). Here, TSYS acquired the numbers  
17 to provide service to EPS' merchants and that is the use that will continue to be made of  
18 it (no brokering). There is no allegation that TSYS sold the numbers to EPS. If the  
19 Court orders that all calls on the EPS numbers be routed as directed by EPS, and that  
20 TSYS bear all costs associated with such routing, there is no risk that more than the value  
21 of the routing is being paid, as nothing will be paid (no sale). Therefore, another  
22 alternative is to order that TSYS route all calls on the EPS numbers as directed by EPS,  
23 without cost to EPS.

24 Although leasing numbers may not be valid in some circumstances, the decision in  
25 *Jahn v. 1-800-FLOWERS.com, Inc.*, 284 F.3d 807 (7<sup>th</sup> Cir. 2002) suggests that a *de*  
26 *minimus* cost lease of the numbers from EPS to TSYS would be appropriate under the  
27 current facts. *FLOWERS* involved a pre-1997 sale of toll free numbers in exchange for a  
28 royalty that was to be paid over time. In 1997 the FCC adopted regulations prohibiting



1 the sale of toll free numbers. The *FLOWERS* court held the royalty remained due even  
2 after 1997, because it was compensation for a sale that at the time it was made, was  
3 permitted. In *FLOWERS* the Court pointed out that before 1997, even though subscribers  
4 of toll free numbers did not “own” them, subscribers were free to contract “about  
5 whatever interest they enjoyed in the numbers”. 284 F.3d at 810. Although sale of  
6 numbers was prohibited after 1997, there was no express prohibition against leasing  
7 whatever interest a subscriber has in the number. The Court’s decision in *FLOWERS*  
8 suggests that so long as the lease does not include, in part, payment for the value of the  
9 number, it is not a sale and therefore, not prohibited. Similarly, the Court may order TSYS to  
10 lease its subscriber interest in the EPS numbers to EPS, for EPS to use them as it deems  
11 appropriate, so long as the lease payment does not reflect in any part the value of the numbers.  
12 A lease by TSYS to EPS for \$1 per year would not violate the FCC prohibition against sale of  
13 numbers (or any other FCC regulation) and would be consistent with the arbitrator’s intent to  
14 provide EPS control over the EPS numbers. Therefore, leasing is another option to  
15 accomplishing Step 2. As discussed, the test the Court must apply in considering TSYS’ motion  
16 is: Does the staff’s ruling make it impossible for the Court to implement what the arbitrator  
17 intended? Clearly it does not. Implementation can be achieved in several ways.

18       Given the multitude of alternatives available to the Court to implement Step 2, with or  
19 without FCC involvement, the most prudent course of action for the Court would be to order  
20 TSYS to work cooperatively with EPS to formulate a plan acceptable to EPS, and subject to  
21 court approval, to give EPS control over the EPS numbers. The formulation of this plan, like  
22 the removal of the non-EPS merchants, should be ordered to be accomplished within the next 90  
23 days.

24       **C. The relief TSYS seeks has already been rejected by the Court because it is**  
25       **contrary to the arbitrator’s intent. The staff’s 2011 ruling cannot change**  
26       **what the arbitrator intended in 2009.**

26       The Court should give short shrift to TSYS’ request to re-institute Option One from the  
27 Court’s January 25, 2011 order, which would allow TSYS to make the EPS numbers unique to  
28 EPS by moving the EPS merchants to new numbers. (Doc. No. 102, p. 6). The Court’s role is to

1 implement the Arbitrator's intent. Option One would have a devastating impact on EPS, which  
2 is not what the arbitrator intended. The Court has already determined that Option One "eroded  
3 the purpose and effect of the Court's Order, and was contrary to the intent of the Arbitrator's  
4 Award." (Doc. No. 102, p. 6). The arbitrator formulated his decision reflecting his intent in 2009.  
5 It is impossible for the FCC staff's 2011 ruling to alter what the arbitrator intended two years  
6 previously. The Court properly ruled that Option One is inconsistent with the arbitrator's intent.  
7 There is nothing in the staff's ruling that magically transforms Option One to now be consistent  
8 with the arbitrator's intent. The Court cannot enforce a remedy that is contrary to the intent of the  
9 arbitrator. *American Postal Workers Union v. United States Postal Service*, 682 F.2d 1280 (9<sup>th</sup>  
10 Cir. 1982).

11 **D. Neither the arbitrator's award, nor the enforcement mechanisms available to**  
12 **the Court are contrary to public policy.**

13 TSYS devotes substantial effort arguing that the arbitrator's award and the Court's  
14 enforcement of it violate law and public policy. Not true. The arbitrator's award grants EPS  
15 "ownership, control, and access to" the EPS numbers. As discussed in previous pleadings, the  
16 terms "owner" and "ownership" as used between the parties in connection with toll free numbers  
17 do not refer to ownership in the formal property ownership sense of the word. Rather it refers to  
18 the exclusive use and control of the numbers by the parties and has been used in this sense on  
19 numerous occasions by TSYS, as well as EPS. (See Declaratory Case, Doc. No 27, pp. 20-23,  
20 and Exhibit 5 thereto, Doc. No. 28-1, p. 29). TSYS has provided no authority that invalidates the  
21 parties agreement to convey exclusive use and control, as determined by the arbitrator and  
22 reflected in his award of "ownership" to EPS.

23 TSYS' arguments address only the ownership aspect of the arbitrator's award. TSYS has  
24 provided no authority to invalidate the arbitrator's award of "control" or "access" to EPS. As  
25 demonstrated above, such control can be given to EPS in a variety of manners, all of which have  
26 been approved by the Courts, are not contrary to law, are supported by public policy  
27 considerations, and none of which violate FCC regulations regarding hoarding, brokering or  
28 selling of 800 numbers. The Court's role is to implement the arbitrator's intent. The clear intent

1 of the arbitrator was to award what the parties agreed to in 2005 - to give to EPS all aspects of  
 2 control over their 800 numbers to the maximum extent permitted by law, so they could move  
 3 their merchants when they needed or wanted to do so. TSYS has provided not a scintilla of law  
 4 to suggest the arbitrator's intent to enforce the parties' agreement is illegal or contrary to public  
 5 policy. Therefore, the cases relied on by TSYS are simply irrelevant to this case, because  
 6 neither the arbitrator's award, nor the plethora of enforcement mechanisms available to the Court  
 7 violate law or public policy.

8 **E. TSYS should be sanctioned for going to the FCC prematurely, unilaterally,**  
 9 **and in an effort to obstruct, rather than facilitate the Court's judgment.**

10 In evaluating TSYS' arguments and proposals, it is important to keep in mind the stage of  
 11 proceeding this case is in and the role required of TSYS. This is an arbitration case that has been  
 12 confirmed and made an order and judgment of this Court. The judgment requires TSYS to (1)  
 13 make the EPS numbers unique to EPS and (2) transfer TSYS' interest in the numbers to EPS to  
 14 the extent permitted by law. TSYS is the losing party subject to the Court's injunctive judgment.

15 The role of a losing party, subject to a federal district court judgment that it has been  
 16 ordered to comply with, is clear. The party is to take all possible steps to achieve what the Court  
 17 has ordered and to do nothing that would make accomplishing the Court's judgment more  
 18 difficult.

19 Federal courts are specifically authorized by statute and rule to use contempt powers  
 20 when a party fails to obey a lawful order. 18 U.S.C. §401 (authorizes a federal court to "punish  
 21 by fine or imprisonment, or both, at its discretion, such contempt of its authority, ...as...(3)  
 22 Disobedience or resistance to its lawful...order...decree, or command.") Fed.R.Civ.P. 70 allows a  
 23 court to "hold the disobedient party in contempt" for a party's failure "to comply within the time  
 24 specified to... perform any...specific act." The Ninth Circuit places a duty on the losing party to  
 25 take affirmative actions, applying the "long standing test" of "whether the defendants have  
 26 performed 'all reasonable steps within their power to insure compliance with the court's orders.'  
 27 *Stone v. City and County of San Francisco*, 968 F.2d 850, 856 (9<sup>th</sup> Cir. 1992). The "reasonable  
 28 steps" standard tests whether there has been "conscientious effort....to comply with [the court's]

1 orders.” *Stone*, 968 F.2d at 857. Additionally, it is not enough for the losing party to do  
2 nothing. It must take all affirmative steps within its power to accomplish what the court ordered.  
3 It is contempt for a losing party to take steps that make compliance with the Court’s order more  
4 difficult. *FTC v. Affordable Media, LLC.*, 179 F.3d 1228, 1239 (9<sup>th</sup> Cir. 1999).

5 In the present case, TSYS lost the arbitration. TSYS lost the vacatur/confirmation  
6 proceeding. As a result, the Court entered a judgment awarding injunctive relief against TSYS  
7 in connection with the 800 number. The Court entered an order to enforce its judgment by  
8 directing TSYS to transfer the non-EPS merchants to non-EPS numbers, and then to transfer  
9 TSYS’ interest in the EPS numbers to EPS. TSYS is obligated to take all steps within TSYS’  
10 power and ability to facilitate moving non EPS merchants off the EPS number and transferring to  
11 EPS whatever rights, authority or interest it has in the EPS numbers to the maximum extent they  
12 can be transferred. What TSYS should have done is to proceed with haste to move the non-EPS  
13 merchants to non-EPS numbers. Then TSYS should have cooperated with EPS to jointly,  
14 cooperatively, and affirmatively apply to the FCC to approve the transfer of the EPS numbers to  
15 EPS based on the voluntary agreement the parties entered into in 2005 for the purpose of  
16 ensuring the uninterrupted continuation of EPS’ business.

17 TSYS did just the opposite. TSYS went to the FCC unilaterally and prematurely, seeking  
18 whatever it could find to prevent implementation of the Court’s order. TSYS did so relying  
19 primarily on the plight of the non-EPS merchants, but never revealing to the FCC that TSYS  
20 caused their plight and, despite having the ability to do so, has refused to remedy it for over two  
21 years. At the same time, to EPS’ knowledge, TSYS has not moved a single non-EPS merchant  
22 off the EPS numbers. TSYS’ message to the Court is clear: It has no regard for the Court’s  
23 orders and no intention of complying with them. In spite of its obligations, TSYS has done and  
24 will continue to do everything within its power to obstruct the Court’s clear order to move the  
25 non-EPS merchants and to transfer control of the numbers to EPS, immediately. EPS requests  
26 the Court send an equally clear message to TSYS: TSYS is not above the law and cannot  
27 continue to impugn the Court.

28

1 **V. CONCLUSION**

2 In order to implement what the arbitrator intended and to finally fulfill the goals of  
3 arbitration, EPS requests the Court do the following:

- 4 1) Deny TSYS' motion.
- 5 2) To the extent it is not already clear, clearly order TSYS to make the EPS'  
6 numbers unique to EPS by removing the non-EPS merchants from the EPS  
7 numbers commencing immediately, to be completed within the next 90  
8 days. Option One is not an option. Option Two is the only option and it is  
9 mandatory. TSYS admits it can move the merchants. It simply does not  
10 want to do so.
- 11 3) Order that TSYS not allow any additional non-EPS merchants to be added  
12 to the EPS numbers. The Court will note that TSYS initially represented that  
13 515,000 non-EPS merchants use the EPS numbers. Then TSYS told the Court it  
14 had issued a bulletin preventing additional merchants from being added. (See  
15 Doc. No. 102, Order of 1/28/11, p. 7, f.n.2). Despite TSYS' representations, the  
16 last time TSYS appeared before the Court the number of non-EPS merchants had  
17 increased to 750,000. TSYS apparently believes if it makes the problem it has  
18 created even bigger, the Court will be less inclined to require TSYS to fix the  
19 problem.
- 20 4) Order that once the EPS numbers have been made unique to EPS  
21 merchants, so long as TSYS remains the subscriber of the numbers, TSYS  
22 exercise its discretion over those numbers only as directed by EPS,  
23 including but not limited to moving the number to another RespOrg and/or  
24 processor if and when EPS directs it to do so, at no expense to EPS. Such  
25 order to remain in effect unless and until FCC approval, satisfactory to  
26 EPS, has been obtained and the numbers have been transferred.
- 27 5) Order TSYS to cooperate fully and completely with EPS in formulating a  
28 plan within the next 90 days to transfer TSYS' interest in the EPS numbers

1 and/or TSYS' control over the EPS numbers to EPS, to the maximum  
2 extent permitted by law. Such plan must be acceptable to EPS and shall be  
3 presented to the Court for approval by the end of such 90 days.

- 4 6) Impose a \$1,000,000 fine for every day after the 90<sup>th</sup> day of its order that TSYS  
5 (1) fails to remove all non-EPS merchants from the EPS numbers, or (2) fails to  
6 cooperate fully with EPS to formulate a plan to transfer TSYS' interest in the toll  
7 free numbers to EPS. Unless and until the Court not only threatens, but actually  
8 imposes sanctions, TSYS has clearly demonstrated that it will continue to ignore  
9 the Court's mandates and do whatever it can to obstruct achieving what the  
10 arbitrator intended and what this Court has ordered. TSYS should be sanctioned  
11 for its past misdeeds and stopped from continuing them.
- 12 7) Impose sanctions as the Court see fit.

13 **DATED** this 21<sup>st</sup> day of March, 2011.

14  
15 /s/ Scotty P. Krob  
16 Scotty P. Krob  
17 Attorney at Law  
18 8400 E. Prentice Avenue, Penthouse  
19 Greenwood Village, CO 80111  
20 Attorney for Defendant  
21 Electronic Payment Systems, LLC

22 **CERTIFICATE OF SERVICE**

23 I hereby certify that on March 21, 2011, I electronically transmitted the attached  
24 document to the Clerk's Office and to Brian J. Foster with Snell & Wilmer  
25 ([bfoster@swlaw.com](mailto:bfoster@swlaw.com)) using the CM/ECF filing system.

26  
27 /s/ Scotty P. Krob  
28

## **EXHIBIT B**

**SCOTTY P. KROB**

*Attorney at Law*

June 22, 2010

Brian J. Foster  
SNELL & WILMER L.L.P.  
One Arizona Center  
400 East Van Buren  
Phoenix, Arizona 85004-2202

SENT VIA E-MAIL

**CONFIDENTIAL SETTLEMENT DOCUMENT**  
**PURSUANT TO F.R.E. 408**

Re: TSYS Acquiring Solutions v. Electronic Payment Systems

Dear Mr. Foster,

By now I am sure both of us have discussed with our clients the possibilities for success in TSYS' new declaratory judgment action. TSYS success seems unlikely, even under the best of circumstances. TSYS has a great deal to lose if it is unsuccessful. On the other hand, if a jury concludes TSYS should have conveyed the EPS number to EPS before now, which seems likely, there is a very real possibility TSYS will have to disgorge itself of the profits it has enjoyed from using the EPS number. These are only a couple of the issues relevant to where the matter goes from here.

Despite TSYS' horrid treatment of EPS, before, during and after the arbitration, EPS would like to get back to the business it knows and does well, and put an end to its battle with TSYS - a global solution, is how I believe you previously characterized IT. The factors relevant to deciding whether to enter into a global settlement and what the terms of it should be, as I see them are as follows:

1. By your own calculations, it will cost TSYS \$12 million just to undertake the required conversion to continue to service other ISOs, non-EPS merchants, and customers.
2. In general during a conversion of a merchant portfolio there is a loss by attrition of about 30%, so even under the best of circumstances, at least 10% of the merchants TSYS will have to convert are likely to be lost, which is 51,000 merchants. Since the conversion would not have been necessary if TSYS had done what the arbitrator and court determined TSYS should have done, the non-EPS ISOs will undoubtedly look to TSYS to be compensated for merchant accounts lost during the conversion. According to affidavits submitted by TSYS, each merchant account is worth between \$ 200 and \$2,500 which represents between \$10,200,000 and \$127,500,000.
3. With regard to EPS' counterclaims in the new lawsuit initiated by TSYS, even assuming all TSYS has collected using EPS' number is the minimum .075 residency fee testified to during the arbitration for 515,000 merchants, that is another \$38,625 per month for 46 months, which amounts to another \$1,776,750. Since the residency fee TSYS originally charged EPS was .75 per merchant per month, this figure would more likely be \$17,767,500 that TSYS may have to disgorge. These figures are likely to go higher once transaction fees and other fees gained from TSYS' use of the EPS number are included.



These three items alone total between \$22 million and \$157 million and do not include the following additional relevant factors.

4. Profits made by TSYS using EPS' number. At this point, frankly I do not know what this figure is and I don't need to know unless the matter goes forward, but it could be equal to or greater than all of those summarized above. If a jury agrees that once TSYS committed to convey the number to EPS in 2005, or at least by the time the arbitrator ordered TSYS to do so, or even by the time the Court ordered TSYS to do so, that TSYS should not have been allowed to make more money using EPS' number, the risk of a sizeable verdict adverse to TSYS seems substantial.
5. Then there are the items you have identified to the Court in your post judgment motions and in the new case, including breach of contract claims or class actions by ISOs other than EPS and non-EPS merchants, actions by consumers over security issues or other losses by any of these groups as a result of TSYS' agreement, as determined by the arbitrator and confirmed by the Court, to grant EPS the same number it had downloaded and apparently continues to download into non-EPS merchant terminals. Given the number of ISOs and merchants you have indicated are likely to be affected, these collective liabilities could dwarf the hard figures discussed above.
6. The hard numbers set forth above also do not take into account the general bad press TSYS may be exposed to if it seems to the banks, the ISOs, the merchants and the consumers that TSYS is not secure as a result of TSYS' fraud, deceptive trade practices, or even just the agreement it entered into to give EPS the EPS number.

The value of the EPS number to EPS is huge, particularly in light of its experiences with CardSystems and TSYS, and how hard it has had to fight to get what it has been awarded. Portability of its merchant portfolio is a critical issue for my client. However, my clients are also businessmen and reasonable.

All of TSYS' exposure to the risks set forth above could be eliminated by EPS' transferring its number back to TSYS. Toward the goal of reaching a global solution between our clients, I am willing to recommend the following settlement to EPS for a brief period of time.

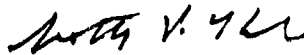
1. EPS will sell its number to TSYS for \$23,976,750.
2. The parties will agree to a 10 year extension of the existing service agreement, with all fees and charges to continue as established during the arbitration and no reductions in services.
3. All claims, whether known or unknown, asserted or not asserted will be deemed satisfied or waived.
4. The settlement, as well as discussion of possible claims by others will be confidential, though the latter provision is not really necessary, as the incentive for claims by others as well as potential bad press should be eliminated, if TSYS regains ownership of the EPS number.
5. TSYS will provide EPS with ownership, control and access to a new set of 1-800 toll free numbers that will be used going forward to connect new EPS merchants to the processor, with such numbers to exclusive and unique to EPS.

Brian J. Foster  
June 22, 2010  
Page Three

As you have already seen, as time passes the price for which EPS is willing to sell its number to TSYS increases. That trend will continue.

Please let me know if you want me to recommend this settlement to my client.

Sincerely,

A handwritten signature in black ink, appearing to read "Scotty P. Krob".

Scotty P. Krob  
Attorney for Electronic Payment Systems

SPK/jz

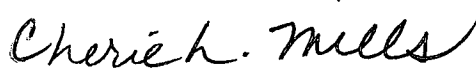
cc: Electronic Payment Systems

**CERTIFICATE OF SERVICE**

I, Cherie L. Mills, a secretary with the law firm of Pillsbury Winthrop Shaw Pittman LLP, hereby certify that a copy of the foregoing “**OPPOSITION TO APPLICATION FOR REVIEW**” was served via first class U.S. mail, postage pre-paid, on this 8<sup>th</sup> day of April, 2011, to the following:

Scotty P. Krob  
Attorney at Law  
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Greenwood Village, CO 80111  
*Counsel to Electronic Payment Systems, LLC*

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Cherie L. Mills